

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TOMMIE LEE MCDOWELL,

Plaintiff,

v.

RICHARD RIMINGTON, et al,

Defendants.

Case No. 3:12-cv-00249-MMD-WGC

ORDER

(Plf.'s Partial Objection to Report and
Recommendation – dkt. no. 57)

I. SUMMARY

Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb (dkt. no. 55) ("R&R") relating to Plaintiff's Motion for Partial Summary Judgment (dkt. no. 23) and Defendants' Motion for Summary Judgment (dkt. no. 41). Plaintiff filed a partial objection to the R&R (dkt. no. 57) and Defendants responded (dkt. no. 58). The Court has considered the objection and the response. For the reasons discussed below, the R&R is adopted in part and rejected in part.

II. BACKGROUND

The facts and background of this case are fully set out in the R&R.

The following motions are pending before the Court: (1) Plaintiff's Motion for Partial Summary Judgment, which solely relates to Counts III and IV of the Complaint (dkt. no. 23); and (2) Defendants' cross motion for summary judgment, which relates to the entire Complaint including Counts I, II, III and IV, and Plaintiff's official capacity damages claims (dkt. no. 41). The R&R recommends the Court enter an order: (1)

1 denying Plaintiff's motion for partial summary judgment; (2) denying Defendants' cross
2 motion motion for summary judgment as to Counts I, II and IV of the Complaint; (3)
3 granting Defendants' cross motion for summary judgment as to Count III; and (4)
4 granting Defendants' cross motion for summary judgment as to Plaintiff's official capacity
5 damages claims. (Dkt. no. 55.)

6 Plaintiff objects to the R&R's treatment of Count III and the R&R's
7 recommendation that summary judgment be granted for Defendants as to that count.
8 (See dkt. no. 57 at 1.)

9 III. LEGAL STANDARD

10 The Court "may accept, reject, or modify, in whole or in part, the findings or
11 recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). Where a party timely
12 objects to a magistrate judge's report and recommendation, the Court is required to
13 "make a de novo determination of those portions of the [report and recommendation] to
14 which objection is made." 28 U.S.C. § 636(b)(1). Where a party fails to object, however,
15 the court is not required to conduct "any review at all . . . of any issue that is not the
16 subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Indeed, the Ninth
17 Circuit has recognized that a district court is not required to review a magistrate judge's
18 report and recommendation where no objections have been filed. See *United States v.*
19 *Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review
20 employed by the district court when reviewing a report and recommendation to which no
21 objections were made); see also *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D.
22 Ariz. 2003) (reading the Ninth Circuit's decision in *Reyna-Tapia* as adopting the view that
23 district courts are not required to review "any issue that is not the subject of an
24 objection."). Thus, if there is no objection to a magistrate judge's recommendation, the
25 court may accept the recommendation without review. See, e.g., *Johnstone*, 263 F.
26 Supp. 2d at 1226 (accepting, without review, a magistrate judge's recommendation to
27 which no objection was filed).

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1 **IV. ANALYSIS**

2 While Plaintiff only objects to the R&R's recommendation as to Count III, the
3 Court finds it appropriate to engage in a *de novo* review to determine whether to adopt
4 the recommendations as to all of Plaintiff's claims.

5 **A. Counts I and IV – Retaliation**

6 The Court adopts in full the R&R's recommendations regarding Counts I and IV,
7 which each assert First Amendment retaliation claims. A retaliation claim requires: "(1)
8 An assertion that a state actor took some adverse action against an inmate (2) because
9 of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
10 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
11 legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2009)
12 (citations omitted). The Court agrees with the R&R that there is no dispute between the
13 parties that the disciplinary proceedings at issue were adverse actions and that the
14 Plaintiff's filing of grievances constitutes protected conduct. Upon reviewing the
15 underlying briefs, the Court finds that there are genuine issues of material fact as to the
16 remaining elements as to both counts. The Court thus finds good cause to adopt the
17 R&R's recommendations that Plaintiff's partial motion for summary judgment be denied
18 as to Count IV, and Defendants' cross motion for summary judgment be denied as to
19 Counts I and IV.

20 **B. Count II - Conspiracy**

21 The Court also adopts in full the R&R's recommendation regarding Count II,
22 which asserts a claim, pursuant to 42 U.S.C. § 1985, for conspiracy to interfere with
23 Plaintiff's rights. To prove a conspiracy, Plaintiff must show "an agreement or meeting of
24 the minds to violate constitutional rights." *See Franklin v. Fox*, 312 F.3d 423, 441 (9th
25 Cir. 2002) (citation and internal quotation marks omitted). The Court finds that there is a
26 genuine issue of material fact as to whether Defendants Rimmington and Oxborow
27 conspired to retaliate against Plaintiff. The Court thus finds good cause to adopt the
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1 R&R's recommendation that Defendants' cross motion for summary judgment be denied
2 as to Count II.

3 **C. Count III – Due Process**

4 The Court adopts in part and rejects in part the R&R as to Count III, which asserts
5 a Fourteenth Amendment due process claim. The Complaint alleges the following facts
6 as to Count III. Plaintiff received a disciplinary report written by Defendant Rimmington
7 alleging that Plaintiff made threats against Rimmington and his family. Defendant Bryant
8 presided as the hearing officer over the disciplinary hearing concerning Plaintiff's alleged
9 threats in April, 2011, and also investigated Rimmington's disciplinary report prior to
10 becoming the hearing officer. Plaintiff told Bryant that he had potential witnesses for the
11 hearing and gave Bryant a list of names, but that Bryant did not allow Plaintiff to call
12 witnesses or introduce witness statements. Bryant considered Rimmington's written
13 report and the report of Defendant Oxborrow, who served as Rimmington's witness.
14 Bryant found Plaintiff guilty of making threats and he was sanctioned to 180 days in
15 disciplinary segregation. In disciplinary segregation, Plaintiff was limited to family-only,
16 no-contact visits. He was forced to shower on his knees in contaminated water for the
17 full 180 days. He did not have a mattress, pillow, bedding, hygiene products or clothing
18 other than undergarments for the first three weeks of segregation. His experience
19 caused him to seek psychiatric treatment.

20 "A procedural due process claim has two distinct elements: (1) a deprivation of a
21 constitutionally protected liberty or property interest,¹ and (2) a denial of adequate
22 procedural protections." *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir.2002). In the
23 Complaint and his motion for partial summary judgment, Plaintiff argues that he was
24 denied three types of procedural protections. The R&R identified these three categories

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26 ¹The R&R considered whether Plaintiff's allegations regarding the conditions of
27 his disciplinary segregation implicate a protected liberty interest. The R&R did not reach
28 a conclusion because it ultimately found that there was no due process violation. As this
issue has not been argued or briefed by the parties, the Court will not examine it at this
time.

1 of procedural protection as: (1) witnesses and witness statements; (2) evidence
2 supporting decision; and (3) impartiality of hearing officer.

3 **1. Witnesses and Witness Statements**

4 The R&R recognized that prison officials have discretion to deny an inmate the
5 opportunity to call witnesses where the witnesses would not add any new information to
6 the hearing. (Dkt. no. 55 at 28-29.) As reflected in the summary report of the disciplinary
7 hearing, Bryant “conceded that any witnesses called would concur any statement made
8 by [Plaintiff] and therefore would be redundant and unnecessary.” (Dkt. no. 23, Ex. 1 at
9 2.) The Court thus agrees with the R&R that Plaintiff’s due process rights were not
10 violated when Bryant denied Plaintiff’s request to present witnesses and their
11 statements.

12 **2. Evidence Supporting Decision**

13 The R&R noted that the screening order in this action (dkt. no. 3) “did not identify
14 a colorable claim based on an alleged deficiency in the evidence relied on making the
15 disciplinary determination[.]” The Court agrees and does not read the Complaint as
16 stating a due process claim for deficiency of evidence. Therefore, the Court will not
17 consider this argument in evaluating the R&R.

18 **3. Impartiality of Hearing Officer**

19 The R&R correctly stated that the screening order does not explicitly discuss a
20 due process claim related to the alleged impartiality of Bryant. The Complaint, however,
21 does allege that Bryant served as both the disciplinary hearing officer and the
22 disciplinary report investigator. (See dkt. no. 4 at 7, 10.) As the R&R recognized, “a
23 prison official who witnesses or investigates an incident cannot sit on a disciplinary
24 committee that determines whether a particular inmate was guilty of any wrongdoing in
25 that incident.” (Dkt. no. 57 at 31 (*quoting Willoughby v. Luster*, 717 F. Supp. 1439, 1441
26 (D. Nev. 1989)).) As the screening order found that Plaintiff stated a colorable claim for a
27 due process violation against Bryant, the Court finds that Plaintiff’s impartiality claim is
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1 viable and should be considered in its summary judgment analysis even though it was
2 not explicitly addressed in the screening order.

3 In his declaration, attached to Defendants' cross motion for summary judgment,
4 Bryant states that he was assigned to be the hearing officer in April, 2011. (Dkt. no. 41-1,
5 Ex. E at 1.) The incident itself occurred on February 28, 2011. (*Id.*) Bryant states that "in
6 preparation of the disciplinary hearing, [he] spoke to senior officer Oxborrow prior to the
7 hearing" (*Id.*) Based on this declaration, the R&R concluded that the "inference
8 could not be drawn that Bryant's discussion with Oxborrow 'in preparation of the hearing'
9 was part of the investigation of the underlying incident." (Dkt. no. 55 at 31-32.)

10 In his objection to the R&R, Plaintiff directs the Court's attention to Oxborrow's
11 declaration attached to Defendants' cross motion for summary judgment. In it, Oxborrow
12 states that "[s]ometime between February 2011 and April 2011, Officer Bryant came and
13 discussed with me what I heard and saw on February 28, 2011" (Dkt. no. 41-1, Ex.
14 C at 1.) If Bryant did investigate the incident, by talking to Oxborrow before being
15 appointed hearing officer in April, 2011, then there could be a violation of Plaintiff's due
16 process rights. The Court thus finds that there is a genuine issue of material fact as to
17 whether Bryant investigated the February 28, 2011, incident prior to being appointed
18 hearing officer. The Court thus rejects the R&R's recommendation that the Court grant
19 summary judgment for the Defendants as to Count III.

20 **D. Plaintiff's Official Capacity Damages Claims**

21 With regard to Plaintiff's official capacity damages claims, the R&R properly
22 recommends granting summary judgment in favor of the Defendants. Defendants are
23 state officials that may not be sued for damages in their official capacity under 42 U.S.C.
24 § 1983. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

25 **V. CONCLUSION**

26 The Court notes that the parties made several arguments and cited to several
27 cases not discussed above. The Court has reviewed these arguments and cases and

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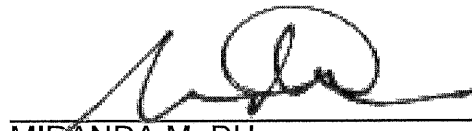
1 determines that they do not warrant discussion or reconsideration as they do not affect
2 the outcome of this order.

3 It is hereby ordered that the R&R (dkt. no. 55) is adopted in part and rejected in
4 part. The Complaint does not allege that Plaintiff's due process rights were violated due
5 to a deficiency in the evidence relied on in his April, 2011, disciplinary hearing.
6 Therefore, the Court rejects the R&R's recommendation, in Section (III)(B)(2)(ii)(b), that
7 summary judgment be granted as to that claim. The deficiency of evidence claim is
8 therefore not viable in this action. The Court further rejects the R&R's recommendation,
9 in Section (III)(B)(2)(ii)(c), that summary judgment should be granted for Defendants as
10 to Plaintiff's claim in Count III of the Complaint that Bryant was not an impartial hearing
11 officer. The impartiality claim therefore remains viable in this action. The Court adopts
12 the rest of the R&R.

13 It is further ordered that Plaintiff's Motion for Partial Summary Judgment (dkt. no.
14 23) is denied.

15 It is further ordered that Defendants' cross motion for summary judgment (dkt. no.
16 41) is granted in part and denied in part. The motion is granted as to Plaintiff's official
17 capacity damages claims. The motion is granted as to Plaintiff's claim in Count III that
18 Bryant violated his due process rights by not allowing him to call witnesses or introduce
19 witness statements at the April, 2011, disciplinary hearing. The motion is denied as to
20 Plaintiff's claim in Count III that Bryant was not an impartial hearing officer. The motion is
21 denied as to Counts I, II and IV.

22 ENTERED THIS 23rd day of September 2013.

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25 MIRANDA M. DU
26 UNITED STATES DISTRICT JUDGE
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